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No. 871

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

PROGRESS DEVELOPMENT CORPORATION,
Petitioner,

v.

DEERFIELD PARK DISTRICT, *Respondent.*

REPLY MEMORANDUM FOR PETITIONER

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The two really striking features of respondent's Opposition are the failure to challenge either the facts set forth in the Petition for Certiorari or the importance of the constitutional question decided by the Supreme Court of Illinois: Respondent's tangential attack on the Petition (in essence a confession and avoidance) eloquently bespeaks the compelling strength of petitioner's case for certiorari.

Significantly, what respondent calls petitioner's "highly biased presentation" of facts (p. 4) is nowhere rebutted in the Opposition. Petitioner's documented presentation of the sequence of events in Deerfield which shows the hand-in-glove participation of public authorities and private

citizenry to replace housing integration with public parks, stands undisputed before this Court.*

Equally significant, the Opposition reinforces the importance of the question decided by the Supreme Court of Illinois—for it reiterates the position, adopted below, that once it is conceded that land is needed for parks and will be used for parks, "Once this step has been reached, the authority of the judiciary to proceed with the case ceases" (Opp., p. 18). Yet this exalting of eminent domain powers as beyond the reach of the Fourteenth Amendment flies in the face of the rulings of this Court (Petition, pp. 17 to 22), which attach constitutional safeguards to the exercise of otherwise legitimate public powers, including the power of eminent domain. Indeed this Court has but recently underlined the fact that constitutional rights do not bow before claims of state convenience or necessity, whatever stature those claims may have in the absence of a constitutional

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* The Opposition, while conceding by its silence the sequence of events from November 11, 1959, when the "Negro news" broke in Deerfield, until December 24, 1959, when this condemnation action began, seeks to leave this Court with the false impression that the sites in question had somehow been selected by the Park Board in May, 1959 (Opp., pp. 3, 5-6). But the material presented in the Opposition demonstrates *precisely the contrary;* the so-called recommendations of the consulting park planner to the Park Board in May of 1959, including the map set forth in the Opposition, was *rejected* by the Park Board (See Petition, p. 5, n. 1). Actually on the overall map of prospective park acquisition which was published in April, 1959 by the Park Board itself, neither Pear Tree nor Floral Park was designated (R. 231). The consulting park planner's map of May, 1959 designated the Floral Park site but *not* the Pear Tree site. *And in the Park Board referendum conducted in August, 1959, neither Floral Park nor Pear Tree was proposed for acquisition* (R. 81). What consideration the Park Board itself had given to the acquisition of these two sites was thus entirely negative until November 11, 1959, when it became known that Negro residents would live at these sites. No one has ever suggested any intervening event other than the integration news which rendered the park sites rejected by the Park Board in August more desirable in December. Nor has anyone ever denied, and the Opposition by its silence concedes, that if petitioner had been building houses for whites only, Floral Park and Pear Tree would long since have been fully-occupied residential developments and the issue of parks thereon would never have arisen.

violation. See *NAACP* v. *Button*, 371 U.S. 415; *Fay* v. *Noia*, 31 Law Week 4255, 4264 (March 18, 1963).

Perhaps petitioner need not have troubled this Court with a Reply, in view of the Opposition's failure to answer either the undisputed facts (Petition, pp. 2 to 14) or the authorities of this Court demonstrating that the Supreme Court of Illinois has employed a dangerously erroneous constitutional standard. But it may not be out of order to correct certain factual errors in the Opposition's tangential attack on two grounds—the suggestion that no constitutional issue arises because no "conspiracy" was found by the Illinois courts (Opp., pp. 14-17) and the claim that petitioner indulges in a racially discriminatory quota system (Opp., pp. 25-31).* Neither point can withstand analysis:

1. The Opposition seeks to shift attention from the erroneous constitutional standard announced and applied by the Supreme Court of Illinois by emphasizing that the Illinois courts had found that there was no "conspiracy" among Park Board members to deny equal protection to petitioner. But the constitutional question does not depend on, nor has petitioner ever restricted its case to, the showing of a technical "conspiracy." Thus in making its defense to the condemnation action in the lower court, petitioner included in its defensive pleading its prior complaint in the federal court; that document repeatedly asserts the denial of equal protection and petitioner's constitutional rights by the condemnation action, apart from and beyond any "conspiracy" by Park Board members. See, e.g., R. 4, 9, 18, 31, 32, 37-38.

* One additional error in the Opposition warrants answer. The Opposition (p. 1) suggests that petitioner failed to comply with the rules of this Court in not printing the trial judge's opinion. But Rule 23(1)(i) expressly states that "where the petitioner has filed with his petition nine copies of the record as printed for the use of the court below . . . then only the pertinent opinions not contained therein need be appended to the petition." Nine copies of the record, which included the trial judge's opinion (R. 246-282), were filed in this case.

Nor did the Supreme Court of Illinois attach any significance to the existence or absence of "conspiracy." In answer to petitioner's argument below—identical to its argument here—the court below simply ruled that all constitutional questions were foreclosed by the showing that petitioner's properties were suitable for and would be used for public parks. Under these circumstances the significant point remains that the narrow constitutional view taken by the Supreme Court of Illinois foreclosed judicial consideration of petitioner's unrebutted showing that the taking of its properties was occasioned by, built upon, achieved through, and resulted in racial segregation in Deerfield, Illinois.

2. In a transparent effort to discredit petitioner's position before this Court that discrimination in housing cannot be achieved through state action, respondent has charged that petitioner itself engaged in racial discrimination in its sales of homes. Such an assertion, unsupported by any evidence at the trial, is completely irrelevant and erroneous. The eminent domain action sprang solely from the news that Negroes would be eligible to buy homes from petitioner; any contention that a so-called quota system of sales is invalid is a pure afterthought having no bearing on the sequence of events in Deerfield.

It is ironic indeed to find an all-white community which has resisted the incursion of *any* Negro resident, pleading before this Court that *not enough* Negroes would be living at petitioner's properties in Deerfield. In any event, there is no showing whatever that petitioner has ever denied or would ever deny housing to an applicant because of his race.* Petitioner does not desire to build new Negro

* As Morris Milgram, President of petitioner's parent organization, testified at the federal trial, "our concern is to prevent uni-racial neighborhoods. It is not our concern to prevent individual whites or individual Negroes from buying houses. But by guiding our advertising to channels that will reach the entire community, to have a community that is representative of all the people."

ghettos, but to demonstrate the viability of integrated suburban developments. To this ends petitioner does everything possible to encourage not merely Negro purchases of its properties, but also a significant ratio of white occupancy. But this encouragement of integration has never involved a discriminatory denial of housing to a Negro applicant, for petitioner abhors the racial discrimination of which it is presently the victim in Deerfield, Illinois. Respondent's hypocrisy is hardly an answer to petitioner's good faith efforts at integration.

* * * * *

By abuse of the power of eminent domain, Deerfield has thus far successfully postponed housing integration for four years. But the constitutional violation which Mrs. Roosevelt so aptly denominated "the Little Rock of housing", can hardly survive the sensitive scrutiny of our highest constitutional tribunal. We urge that the writ be granted.

Respectfully submitted,

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